87-2133

Nos. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LEGISLATURE OF THE VIRGIN ISLANDS,
Appellant,

HELEN GJESSING, Individually and as President of Save Long Bay Coalition, Inc., LEONARD REED, Individually and as President of Virgin Islands Conservation Society, Inc., KATE STULL, Individually and as President of League of Women Voters of V.I., Inc., LUCIEN MOOLENAAR, Individually and as President of Virgin Islands 2000, Inc., RUTH MOOLENAAR, Individually and as Director of St. Thomas Historical Trust, Inc.,
Appellants,

v.

WEST INDIAN COMPANY, LTD.,
Appellee,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
Appellee.

On Appeal from the United States Court of Appeals for the Third Circuit

JURISDICTIONAL STATEMENT OF APPELLANT LEGISLATURE OF THE VIRGIN ISLANDS

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QUESTION PRESENTED

Does Act 5188 of the Legislature of the Virgin Islands violate the contract clause of Article 1, Section 10 of the United States Constitution when the Act's only effect is to subject appellee to the reasonable environmental permitting requirements of the Coastal Zone Management Act?

PARTIES TO THE PROCEEDINGS

The parties to these appeals are listed on the title page in their entirety. The Legislature of the Virgin Islands and the remaining intervenors are submitting separate jurisdictional statements to better reflect the interests and issues most important to the different parties. A Joint Appendix is used and all appendix references will be to this Joint Appendix.

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OPINIONS BELOW

The decision of the Third Circuit Court of Appeals which forms the basis of this appeal was entered on

March 31, 1988. The decision is reported at 844 F.2d 1007 (3rd Cir. 1988), and is printed in the Joint Appendix ("App.") at page 6a. The legislature timely filed its notice of appeal from this decision to the United States Supreme Court on June 13, 1988. App. 4a. The proceedings prior to that opinion were as follows:

WICO sued the Government of the Virgin Islands on August 14, 1986 seeking a temporary restraining order and other injunctive and declaratory relief to prevent enforcement of Act 5188 (the "Repeal Act.").

WICO's motion for a temporary restraining order was heard on August 19, 1986. The hearing was ex parte; the Virgin Island's Attorney General appeared only to withdraw his representation because the executive branch had vetoed the Repeal Act. The district court granted WICO's motion, temporarily restraining the Government of the Virgin Islands from enforcing the Repeal Act in any way.

WICO's motion for preliminary injunction was heard on August 26 and 27, 1986. The Legislature of the Virgin Islands was allowed to participate at this hearing. The district court issued its injunction on September 3, 1986, enjoining "the Government of the Virgin Islands, the Virgin Islands Legislature, and the citizen intervenors captioned above from enforcing Act No. 5188." *West Indian Co., Ltd. v. Government of the Virgin Islands*, 643 F.Supp. 869 (D.V.I. 1986). App. 53a.

The Legislature filed a timely notice of appeal from this decision on September 9, 1986. The United States Court of Appeals for the Third Circuit affirmed the district court's preliminary injunction on February 26, 1987. *West Indian Co., Ltd. v. Government of the Virgin Islands*, 812 F.2d 134 (3rd Cir. 1987). App. 50a.

WICO moved for summary judgment on its underlying claim on November 10, 1986. On April 13, 1987, the district court entered a Memorandum Opinion and Order

which, *inter alia*, granted WICO's motion for summary judgment. The district court additionally issued a separate permanent injunction ordering that the Government of the Virgin Islands, the Legislature of the Virgin Islands, and citizen-intervenors be permanently enjoined from interfering with WICO's project. *West Indian Co., Ltd. v. Government of the Virgin Islands*, 658 F.Supp. 619 (D.V.I. 1987). App. 41a.

JURISDICTION

This appeal is brought under 28 U.S.C.A. § 1254(2) from an opinion of the United States Court of Appeals for the Third Circuit rendered on March 31, 1988 holding invalid a statute of the Virgin Islands Legislature. This Court has apparently not yet determined whether the invalidation of a territorial statute confers appellate jurisdiction under 28 U.S.C.A. § 1254(2). Given Congress' grant of full legislative authority to the Virgin Islands in the Revised Organic Act of 1954, 48 U.S.C.A. § 1541 et seq., however, Appellant submits that an enactment of the Territorial Legislature should be treated as the equivalent of an enactment of a State Legislature.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 10, United States Constitution

> No State shall . . . pass any . . . law impairing the obligation of contracts. . . .

The Virgin Islands Coastal Zone Management Act, V.I. Code Ann. tit., XII § 901 et seq. (1987) and Acts Nos. 3326, 4700 and 5188 are reproduced in the appendix at pages 207a, 178a, 176a, and 175a, respectively.

STATEMENT OF THE CASE

This case involves three statutes enacted by the Legislature of the Virgin Islands in 1973, 1982 and 1986, respectively. The effect of the first two statutes was to

grant The West Indian Company ("WICO") a specific exemption from the need to seek a § 911 coastal zone permit for the filling and development of certain submerged land in St. Thomas harbor. The third statute repealed the first two and directed WICO to apply for such a permit. The court below found this third statute in violation of WICO's rights under the Contract Clause.

The proceedings that led up to the enactment of these statutes began in 1968 when the United States filed suit against WICO to quiet title in these harbor lands. The United States claimed it owned the submerged land because WICO's purported rights to dredge and fill under a 1913 grant from the Danish Government were invalid or had lapsed from non-use. App. 85a. The Government of the Virgin Islands was not named as a party to this action and never became a party.

WICO offered to settle its title claim with the United States by giving up its claimed rights to fill 42 acres in exchange for the right to fill 30 acres in the harbor. The trial judge wrote the Governor of the Virgin Islands and every member of the Legislature, at WICO's request, to strongly recommend settlement. App. 90a, 120a. The trial judge intimated that he might well find for WICO on the title question, although the case had not yet gone to trial. *Id.*

A Memorandum of Understanding ("Memorandum") setting forth settlement conditions was then signed by the parties to the 1968 litigation on October 3, 1973. The Legislature of the Virgin Islands had directed the Governor of the Virgin Islands to recommend to the U.S. Departments of Interior and Justice to implement a settlement a year earlier in Act 3326. App. 178a. The Government of the Virgin Islands was asked to, and did, sign this Memorandum although not a party to the litigation. App. 117a.

Further proceedings in the district court were then stayed pending fulfillment of the Memorandum's condi-

tions. Among those conditions was the requirement that WICO must quitclaim its 1913 dredge and fill grant from Denmark to the United States. Judgment would then be entered in favor of the United States, but giving WICO fee title and all reclaimation rights to the 30 or so acres it claimed. The Memorandum provided that any conveyance of land rights had to be made under the Territorial Submerged Lands Act. 48 U.S.C.A. § 1701 *et seq.* Under that Act, the Secretary of the Interior was required to notify the Committee of Interior and Insular Affairs of both Houses of Congress, which could disallow the conveyance within sixty days. 48 U.S.C.A. § 1701(c) (1972).

This conveyance was never brought before Congress, which amended the Territorial Submerged Lands Act in 1974. This amendment conveyed, subject to existing rights, title to all submerged lands in the Virgin Islands to the Government of the Virgin Islands "to be administered in trust for the benefit of the people thereof. App. 192a, 194a.

At WICO's suggestion, a First Addendum to the Memorandum of Understanding was executed on October 28, 1975 to reflect the changes in the Submerged Lands Act. This First Addendum basically substituted the Government of the Virgin Islands for the Department of the Interior of the United States. The Virgin Islands would thus convey the subject lands directly to WICO, rather than first obtaining title from the United States. App. 145a. This Addendum was not submitted to the Legislature of the Virgin Islands.

In 1978, the Virgin Islands Legislature enacted a Coastal Zone Management Act (CZMA) in order to quality for funds under 16 U.S.C.A. § 1451 et seq. The CZMA establishes regulatory procedures for the Virgin Island's administration of Trust and other coastal lands. App. 207a. All lands adjoining the coast, including reclaimed portions of the harbor, were made subject to the CZMA's

permitting procedures. These permits require the Government of the Virgin Islands to control the type and density of development in coastal areas in light of environmental and other local concerns. The CZMA has no effect on the fee title of lands privately held at the time of its enactment, but limits the nature and extent of future conveyances of submerged lands by the Government of the Virgin Islands.

WICO sent a letter and draft complaint to the Governor and Legislature of the Virgin Islands on March 16, 1979, stating that if the CZMA was applied to its property it would sue the Virgin Islands for five million dollars. App. 198a. In response, the Government of the Virgin Islands signed a Second Addendum to the 1973 Memorandum of Understanding in 1981 exempting WICO from the CZMA. App. 151a. The Addendum reduced the total amount of developable acres in the harbor to approximately 15 and purported to authorize development for any of a list of zoning uses on WICO's reclaimed land. The Second Addendum was ratified by the Legislature of the Virgin Islands by Act No. 4700 on March 24, 1982. App. 176a.

WICO did not begin actual dredging in the harbor until June of 1986. The Legislature then reviewed the entire history of the project and passed Act 5188 which repealed Act No. 3326 and Act No. 4700 and directed WICO to apply for a coastal zone permit under Sections 910 and 911 of the CZMA. The Governor vetoed the Bill on August 11, 1986, but was quickly overridden by the Legislature. The Department of Conservation and Cultural Affairs (now known as the Department of Planning and Natural Resources) then served a cease and desist order against WICO, preventing further work without a proper permit under the CZMA. App. 205a. This litigation is thus centered on the Legislature of the Virgin Islands' constitutional ability to require WICO to comply with the CZMA's permitting requirements for development in a sensitive coastal zone.

THE QUESTION PRESENTED IS SUBSTANTIAL

I. THE REPEAL ACT DOES NOT SUBSTANTIALLY IMPAIR ANY CONTRACT RIGHTS WICO MAY HAVE IN THE DISPUTED LAND.

At the core of the complex facts of this case is a situation not unlike the one addressed by this Court in *California Coastal Comm'n v. Granite Rock*, —— U.S. ——, 107 S. Ct. 1419 (1987). There, a mining company claiming title under an old federal statute sought to parlay its mining rights into a supremacy-based exemption from the environmental permitting requirements of California's coastal zone laws. Here a development company, claiming title under a long dormant letter from the Danish sovereign, seeks to parlay its alleged dredging rights into a colonial fiefdom that is constitutionally protected against compliance with the environmental permitting requirements of The Virgin Islands' coastal zone laws.

Appellant submits that the Virgin Islands Legislature has merely demanded that WICO apply for the same type of environmental permit as would be applicable to any one else in the same circumstance, and that no act of the Virgin Islands Legislature has affected whatever title WICO may have to its property. Furthermore, that even if some statutory provision were to be construed as unconstitutionally impairing WICO's title, the lower courts erred in striking down the entire statute including the environmental permitting requirements.

A. The Repeal Act Simply Requires WICO to Obtain Development Permits Under the CZMA.

The Repeal Act repealed Acts 3326 (authorization and recommendation to join settlement of quiet title action through Governor and U.S. Departments of Interior and Justice) and 4700 (Exemption from CZMA and legislation ratification of Second Addendum) and specifically provided that WICO must comply with § 911 of the CZMA. It affected only those aspects of that previous

statutes that required legislative action to be effective. Its intent and purpose was to subject WICO to the permitting requirements of the CZMA.

The Circuit Court correctly noted that the CZMA was designed "to set up a comprehensive program for the management, conservation, and orderly development of the coastal area . . . ." 844 F.2d at 1011. The CZMA provides the only means of controlling the intensive coastal development WICO is proposing. It ensures that development of sensitive coastal lands takes place in an environmentally sensitive manner.

The CZMA requires owners of submerged or filled lands to obtain permits under both Sections 910 and 911 prior to developing or occupying such lands. V.I. CODE ANN. tit. XII §§ 910(a)(1); 911(a)(1) (1987). It applies to both privately held lands and public trust land. The Circuit Court read § 911(a)(1) to limit WICO's interest in the subject lands to a permit or lease of no more than twenty years' duration. 844 F.2d at 1011-12, 1022. The Court's reading was erroneous and formed the basis for its entire discussion of the constitutional issues involved.

Section 911(a)(1) of the CZMA provides in its entirety that:

> No person shall develop or occupy the trust lands or other submerged or filled lands of the Virgin Islands without securing a coastal zone permit which includes, in addition to the elements of a section 910 permit, a *permit or lease* for the development or occupancy of the trust lands or other submerged or filled lands. (emphasis supplied)

The Circuit Court read the emphasized phrase as conjunctive, limiting WICO's property interest to a "maximum of 20 years." 844 F.2d at 1011. That is not what the statute says. The CZMA allows development and occupancy of privately held submerged or filled lands under

a *permit* that is issued for some unspecified definite term. That term could be for any number of years and is fully renewable. § 911(d)(1). A *lease* is required only for public lands, and may be issued only for a nonrenewable period of twenty years. § 911(d)(1). Permits have no such restriction. The Circuit Court confused the limited duration of a lease on public land with the unlimited duration of a permit on private land. If WICO's title is valid it would thus be free to apply for fully renewable permits for as long as it owns and develops the land in accordance with the CZMA's requirements.

B. The Repeal Act Has No Effect on Whatever Title WICO May Have Received From the United States.

1. *The CZMA Does Not Affect Title.*

The CZMA is a typical environmental regulatory permitting statute. It requires permits prior to developing and occupying environmentally sensitive land. It has no effect on title to privately held land because nothing in its provisions affect ownership or alienability of such land. The Circuit Court thus made a serious error when it found that the Repeal Act would prevent WICO from ever taking "title to the areas it fills . . . ." 844 F.2d at 35. WICO already has whatever title it may have acquired as a result of its settlement of the United States' 1968 quiet title action.

Only publicly held trust or other submerged or filled lands are limited in ownership to a twenty year lease under § 911(d)(2). Title to public trust land must remain in the public domain. It cannot be conveyed away in fee simple. Yet title to privately held lands remains freely alienable. The CZMA does nothing more than regulate development and occupancy of *all* coastal lands under § 910 and § 911. Whatever the state of WICO's title in its harbor property, the CZMA cannot affect it in any way.

2. *The Repeal of Acts 3326 and 4700 Does Not Affect WICO's Title.*

WICO's title to the land it claims in St. Thomas harbor was never dependent on some ratification from the Legislature of the Virgin Islands. Whatever title it has came from the United States as part of WICO's settlement of the 1968 quiet title action brought against it by the United States. Appellant neither concedes nor contests WICO's title. Its position is that the Repeal Act does not affect whatever title WICO received from the United States.

Neither the executive nor legislative branch of the Virgin Islands was a party to the 1968 quiet title action. They could not have been since the Virgin Islands had no legal interest in the disputed land. The Virgin Islands had no title in the subject submerged lands prior to the October 3, 1973 date of the Memorandum, and would have no title interest in the lands after the execution and performance of the Memorandum. Title was to flow from the United States through the Government of the Virgin Islands to WICO. The only reason the Government was even involved was because the then applicable procedures of the Territorial Submerged Lands Act, 48 U.S.C.A. § 1701 et seq., required such a complicated transfer.

Congress' amendment of the Territorial Submerged Lands Act in 1974 conveyed title to all submerged land in the territory then owned by the United States to the Virgin Islands. The First Addendum, which was never presented to the Legislature and was thus not addressed in the Repeal Act, merely noted this change in title. Title still came from the United States through the Virgin Islands and then on to WICO. The Government of the Virgin Islands was never required to pass judgment on that title.

More importantly, the Repeal Act could only affect Acts 3326 and 4700 to the extent they required legislative input in the first place. The legislature had no responsibili-

ties as to title under the Submerged Lands Act, from which WICO's claim of title derives.

The legislature was needed to exempt WICO from the CZMA's environmental permitting requirements in the Second Addendum, which was the very target of the Repeal Act. The transfer of title was from the United States to WICO. Any governmental duty of the Virgin Islands required for transfer of title could have been fully carried out by the executive branch, just as it was in the First Addendum.

Perhaps the best evidence of the Repeal Act's intent comes from its legislative history. During discussion of the then proposed repealing legislation, an amendment was proposed that would "designate the existing area as public." App. 180a. The sponsor of this amendment, Senator Bryan, was of the opinion that the land WICO dredged was "the people's land" and not WICO's. App. 183a. Senator Shatkin then asked counsel for the Legislature what the effect of such an amendment would be. App. 183a-184a. Counsel replied that "it would mean that the government has taken private property, and converted it into publicly owned property." 184a. The amendment was then voted on and failed, clearly reflecting the legislative intent to avoid infringing whatever title WICO may have had in that land. App. 184a.

3. *If WICO Believes the Repeal Act Affected its Title It Had an Adequate Remedy in a Quiet Title Suit.*

If WICO's true concern in this action is its claim to title, and not its displeasure with the CZMA's permitting requirements, it had an adequate remedy in its own quiet title action. Such actions are commonly used to set property rights in coastal lands. *See e.g. Alexander Hamilton Life Insurance Co. of America v. Government of the Virgin Islands*, 757 F.2d 534 (3rd Cir. 1985). WICO

could have avoided unnecessary constitutional questions while fully preserving its title interests by pursuing such a course.

Where such ordinary remedies can preserve contractual rights this Court has found that the contract in question has not been impaired. *See Hays v. Port of Seattle*, 251 U.S. 233, 237 (1920). *See also St. Paul Gaslight Co. v. City of St. Paul*, 181 U.S. 142 (1901). WICO could thus have received a full and fair hearing on all of its objections to the Repeal Act without requiring the lower courts to decide an unnecessary constitutional issue.

4. *Even if the Repeal Act Were Construed as Affecting WICO's Title the Lower Courts Erred in Striking Down the Entire Act.*

If the Repeal Act were to be construed in such a way that it unconstitutionally impaired WICO's title (and appellant submits that only a tortured construction would lead to such a conclusion) the unconstitutional portion of the act should have been severed from the constitutional portion. Severance of unlawful from lawful statutory provisions is a common and tested technique in the federal courts. *K Mart Corporation v. Cartier, Inc.*, —— U.S. ——, —— S. Ct. ——, 56 U.S.L.W. 4478, 4481 (U.S. May 31, 1988); *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984). It ensures that the courts pay the proper respect due a co-equal branch of government and narrows the issues properly before the court. If WICO's title was the controlling question below it should have been specifically addressed.

C. Merely Requiring WICO to Apply for Permits Under the CZMA Does Not Substantially Impair a Contractual Relationship.

This Court has often stated that even though the Contract Clause appears to proscribe any contractual impairment at all, "the prohibition is not an absolute one and is

not to be read with literal exactness like a mathematical formula." *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 428 (1934). Only "substantial impairments" are barred, and the determination of what is a "substantial impairment" is done on a case-by-case basis. *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 21 (1977); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 243-44 (1978); *Keystone Bituminous Coal Association v. DeBenedictus*, —— U.S. ——, 107 S. Ct. 1232, 1252 (1987).

Requiring WICO to comply with the CZMA is a "minimal alteration" of a contractual obligation because it does not limit WICO's ownership or prevent development of the filled lands. *Spannaus*, 438 U.S. at 245. Since every case must be individually considered to see if an alleged impairment is "substantial", appellant would urge the Court to closely examine the CZMA's permitting requirements as discussed above. The § 911 provisions found so burdensome by the Circuit Court are similar to and even less burdensome than the environmental impact statement provisions of the National Environmental Policy Act. 42 U.S.C.A. §§ 4321-4361. Appellant respectfully submits that the Repeal Act's effect of requiring WICO to comply with the CZMA—which every single other developer of filled land in the Virgin Islands must do—is not a "substantial impairment" of any contractual obligation of the government of the Virgin Islands may have.

D. Whatever Contract Rights WICO May Have Had Were Always Subject To Future Legislative Acts Because WICO Was Engaged In A Highly Regulated Industry.

The extent of a particular industry's prior regulation is part of this Court's threshold inquiry into whether an impairment is "substantial" or not. *Energy Reserves Group, Inc. v. Kansas Power and Light Company*, 459 U.S. 400 (1983). As stated by the Court there, "[i]n

determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past." *Id.* at 411.

The major objective of the Contract Clause is to protect legitimate business expectations in contractual relationships. *Spannaus*, 438 U.S. at 245. The parties to a contract have different expectations in a non-regulated industry than they do in one which is regulated, for "[w]hen he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic." *Veix v. Sixth Ward Bldg. and Loan Ass'n*, 310 U.S. 32, 38 (1940). In a regulated industry setting, the parties cannot reasonably anticipate that they will be free from future regulation, even future regulation upon the very topic which their contract concerns. The regulated industry exception thus serves public policy because "[o]ne whose rights, such as they are, are subject to state restriction, may not remove them from the power of the State by making a contract about them." *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908).

There can be no question that land development in coastal areas, especially development of submerged lands, is and has been a heavily regulated industry. Besides the requirements of the Coastal Zone Management Act, coastal regulation has been subject to the dredge and fill permitting requirements of Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C.A. § 403, and Section 404 of the Federal Water Pollution Control Act, 33 U.S.C.A. § 1344. *See also California Coastal Comm'n v. Granite Rock Co.*, —— U.S. ——, 107 S. Ct. 1419 (1987). The United States Army Corps of Engineers and the Environmental Protection Agency have extensive control over coastal development under these statutes and the extensive underlying regulations. The Fish and Wildlife Service also regulates certain coastal developments under 16 U.S.C. § 661-666.

States and territories, including the Virgin Islands, also have a significant regulatory presence in coastal development. Title Twelve of the Virgin Islands Code has eight separate chapters applicable to coastal development. *See* Title VII V.I.C. chs. 1, 3, 5, 7, 10, 13, 15, 17 (1982). *See also* Ausness, *Land Use Controls in Coastal Areas*, 9 Cal. W.L. Rev. 391 (1973).

A contract is not impaired if a party is restricted to its reasonable expectations. *Enegry Reserves Group, Inc.*, 459 U.S. at 411. The Repeal Act simply added permitting conditions under the CZMA. There can be no "substantial impairment" where the only effect of a valid legislative act is to place additional and reasonable regulations upon a field that is already extensively regulated. Whatever impairment of any contract may have occurred as a result of the Repeal Act has been de minimis. Such a de minimis impairment does not breach the constitutional threshold.

II. EVEN ASSUMING THAT WICO HAS EXISTING CONTRACT RIGHTS AND THAT THOSE RIGHTS WERE SUBSTANTIALLY IMPAIRED, THE REPEAL ACT DOES NOT VIOLATE THE CONTRACT CLAUSE BECAUSE THE IMPAIRMENT WAS JUSTIFIED UNDER THE VIRGIN ISLANDS' RESERVED SOVEREIGN POWERS.

Legislative bodies possess inherent powers to regulate the safety and well-being of the citizens they represent. This police power is an inalienable function of a state or territorial government. The Court has long recognized that succeeding legislatures must retain plenary police power. As early as *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) it was noted that "one legislature cannot abridge the powers of a succeeding legislature," and in *Stone v. Mississippi*, 101 U.S. 814 (1880) it was firmly established that certain powers of government could not be contracted away:

> The people, in their sovereign capacity, have established their agencies for the preservation of the public

> health and public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; *but they cannot give away or sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must 'vary with varying circumstances'*.

101 U.S. at 820. Yet this is exactly what has been forced upon the Government of the Virgin Islands by the court below As interpreted by the court below, the earlier legislature, which exempted WICO from the CZMA, contracted away "the discretion of those that are to come after them". It is not unreasonable for the current legislature to re-establish those reserved sovereign powers. Appellant submits that when this Court balances the "strictures of the contract clause with the 'essential attributes of sovereign power'. . . necessarily reserved by the States to safeguard the welfare of their citizens", it will find that even if a substantial impairment of a contractual relationship has occurred it is not a constitutionally invalid impairment. *Unted States Trust Co.*, 431 U.S. at 21 (citations omitted).

When a State has impaired its own contractual obligations, the Reserved-Powers Doctrine:

> requires a determination of the State's power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment. In short, the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty.

Id. at 23. The police power and power of eminent domain were historically among the powers that could not be "contracted away", unlike the taxing and spending powers. *Id.* This distinction reflects the understanding that taxing and spending powers are discretionary, unlike the sovereign power to protect the health, safety and wel-

fare of the populace. Reserved sovereign powers are essential because legislative bodies "must possess broad power to adopt regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result." *Id.* at 22.

Of particular interest to the legitimacy of the Repeal Act is the fact that the "Contract Clause does not prohibit the States from repealing or amending statutes generally, or from enacting legislation with retroactive effects". *Id.* at 17. Only if a specific constitutional provision is implicated will repealing legislation be invalidated. The contract clause is not implicated here because of the Repeal Act's overriding public purpose.

A. To Prohibit The Legislature of the Virgin Islands From Applying The Reasonable Regulatory Requirements Of The CZMA To WICO's Waterfront Development Would Deny The Legislature One Of Its Most Essential Attributes Of Sovereign Power —The Ability To Preserve And Protect The Health, Safety, And Welfare Of Its Citizens.

This is not the type of case the framers of the Constitution had in mind when drafting the Contract Clause. The "primary focus" of the Contract Clause "was upon legislation that was designed to repudiate or adjust preexisting debtor-creditor relationships that obligors were unable to satisfy." *Keystone*, —— U.S. ——, 107 S.Ct. at 1251. This is a case involving a legislature that repealed the legislative acts of an earlier government that tied the hands of future legislatures from acting in the best interests of the health, safety, and welfare of the citizens of the Virgin Islands. The Government's spending and taxing powers are not implicated. It is the exercise of the police power that is at stake. WICO seeks to prevent this and all future governments from exercising their police power in regulating coastal development.

The right to control real estate development through environmental and other police power regulations is one

of the most commonly recognized "essential attributes of sovereign power". *Blaisdell*, 290 U.S. at 435. The second addendum is virtually a manifesto of denial of this sovereign power. Paragraphs 7, 11(a)(i)(y) and (z), 11(a)(ii), 11(b), 12(b), and 19(c) of the Second Addendum all specifically prohibit the application of the normal permitting and monitoring requirements of the CZMA to WICO's reclaimed harbor land. App. 159a, 164a, 165a, 166a, 172a.

In cases of this sort, where the primary purpose of the contract clause is not implicated but an essential attribute of a state or territory's sovereignty is, the Contract Clause must be subordinated to the police power. This case is identical in its analysis and impact to *Energy Reserves Group, Inc.* There the Court stated that "[t]o the extent, if any, the Kansas Act impairs ERG's contractual interest, the Kansas Act rests on, and is prompted by, significant and legitimate state interest." 459 U.S. at 416.

The reserved powers doctrine is also consistent with the presumption of validity reviewing courts give legislative enactments. *See United States Trust Co.*, 431 U.S. at 22-23; *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945). The lower court decisions in this action show a complete absence of any such due regard to the Virgin Islands' Legislative authority. The Circuit Court's opinion is particularly patronizing in tone. The reserved police power is not so easily subjugated to a real estate developer's wishes as that opinion seems to indicate. Viewed in its proper context, the Repeal Act is a valid legislative response to public concern over a reserved power that a prior legislature had unwisely purported to forego in perpetuity.

The fact that WICO is subject to other applicable federal and territorial laws under the Memorandum and subsequent addenda is irrelevant to a larger issue involved here. Executive and legislative decisions encom-

passed within Acts 3326 and 4700 emasculated future governments from applying the only unified body of coastal land development regulations in existence in the Virgin Islands. In a case such as this, "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . ." *Berman v. Parker*, 348 U.S. 26, 32 (1954).

The interests secured under the police power are dynamic and evolutionary in nature. They cannot be frozen to the particular interests of a given governmental body absent specific constitutional limitations. Appellant submits that those constitutional limitations are simply not present in this case. Moreover, the denial of its right to act in the best public good under its police power is an unwarranted and unwise limitation of the Virgin Islands' sovereign powers.

B. The Repeal Act is Based on a Significant and Legitimate Public Purpose and is a Reasonable and Appropriate Response to Development on Highly Sensitive Coastal Land.

Once a State has been found to significantly impair a contract, the State "must have a significant and legitimate public purpose behind the regulation. . . ." *Energy Reserves Group, Inc.*, 459 U.S. at 411. If a legitimate public purpose exists, the next step is "whether the adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.' " *Id.* at 413, quoting *United States Trust Co.*, 431 U.S. at 22. The Repeal Act easily meets this standard.

"The requirement of a legitimate public purpose guarantees that the State is exercising its police power rather than providing a benefit to special interests". *Energy Reserve Group, Inc.*, 459 U.S. at 412. The Repeal Act was

enacted solely to reassert the legislature's police power authority over a sensitive coastal development. While directed at WICO's lands in particular, the effect of the Repeal Act was simply to bring WICO within the same land use regulations covering every other developer in the Virgin Islands. The legislative discussion of the Repeal Act proves its legitimacy. The primary concern expressed during debate was whether the legislature had given up its police power. App. 180a. This is the most basic of legitimate public purposes.

The reasonableness of a legislative act which simply brings a coastal developer within the regulatory realm with which all other developers must comply cannot be questioned. It does not affect WICO's purported ownership of the reclaimed lands. It simply guarantees that the health, safety and welfare of all citizens of the Virgin Islands—including WICO's—will be protected by the constraints of the Coastal Zone Management Act.

The Repeal Act was a necessary legislative response to the perils of unsupervised coastal development that could not have been accomplished through any alternate, less drastic measure. *United States Trust Co.*, 431 U.S. at 29-30. No action short of the Repeal would have allowed the government of the Virgin Islands to reassert its right and power to protect its citizens from potential ill effects of WICO's development, the nature and extent of which WICO has refused to specify. The fairest and simplest way of bringing WICO within the same standards facing all other coastal developers is through the effective enforcement of § 911 of the CZMA as required by the Repeal Act.

CONCLUSION

The Repeal Act does not substantially impair any contractual obligations of the Virgin Islands. Its sum and substance is merely to bring WICO within the reasonable environmental permitting requirements of the CZMA. It has no effect on title and should not be construed in such a way that it does. There can be no constitutional infringement where the only result of a valid legislative enactment is to bring a coastal real estate developer within the same environmental constraints as any other developer.

Yet even if there were some substantial impairment as a result of the Repeal Act there still would be no constitutional violation. The protection of the health, safety and welfare of the Citizens of the Virgin Islands is an inalienable right and power of each succeeding legislature. This reserved sovereign power cannot be contracted away in perpetuity.

For all of the foregoing reasons, this Court should accept jurisdiction of this appeal.

Respectfully submitted,

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